

**MINUTES
of the
FOURTH MEETING
of the
CRIMINAL JUSTICE REFORM SUBCOMMITTEE
of the
COURTS, CORRECTIONS AND JUSTICE COMMITTEE**

**May 28, 2014
State Capitol, Room 321
Santa Fe**

The fourth meeting of the Criminal Justice Reform Subcommittee (CJRS) of the Courts, Corrections and Justice Committee (CCJ) was called to order by Representative Antonio "Moe" Maestas, co-chair, on May 28, 2014 at 9:20 a.m. in Room 321 of the State Capitol.

Present

Rep. Antonio "Moe" Maestas, Co-Chair
Rep. Gail Chasey
Rep. Zachary J. Cook
Sen. Cisco McSorley
Sen. Bill B. O'Neill
Sen. Sander Rue

Absent

Sen. Lisa A. Torracco, Co-Chair
Rep. Jane E. Powdrell-Culbert

Guest Legislator

Sen. Richard C. Martinez

Staff

Douglas Carver, Staff Attorney, Legislative Council Service (LCS)
Caela Baker, Staff Attorney, LCS
Monica Ewing, Staff Attorney, LCS

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written testimony are in the meeting file.

Wednesday, May 28

Welcome and Introductions

Members of the CJRS introduced themselves.

New Mexico Results First and Criminal Justice

Ashleigh Holand, manager, state policy, Pew-MacArthur Results First Initiative ("Results First"), told members of the CJRS that Results First, a project of The Pew Charitable Trusts, helps states implement a cost-benefit approach to identify which policies and programs will be effective. The Results First approach helps state leaders make strategic budget choices by identifying: 1) the programs that are currently funded; 2) the cost of each program; 3) the effectiveness of each program; and 4) how each program compares to alternatives.

Results First developed a tool that uses national data and research to predict state-specific results and calculate the long-term costs and benefits of programs. Ms. Holand indicated that the Corrections Department (NMCD) has already taken the first step, which is to create a catalog of programs that are currently funded. Although the NMCD has identified existing programs run by the NMCD, not a lot of data are available on which programs are provided in the community.

The next step is to look at program costs; however, Ms. Holand cautioned that it is important not only to look at costs, but also to evaluate what each investment will actually buy in the long term. If agencies are asked to evaluate programs, it is important to ensure that agencies have the tools and resources they need to properly conduct the evaluation. The goal is to move money away from programs that are ineffective and invest in programs with proven results.

When examining program costs and benefits, it is important to consider whether programs have been implemented with fidelity. Implementation fidelity is the degree to which programs are implemented as intended by the program developers. Implementation fidelity can have a significant impact on program results.

States' Success with Results First

Results First is involved in 18 states and helps each state to build its own state-specific model. Results First provides software, technical assistance and expertise during the process. New Mexico is one of nine states that has implemented a state-specific model. Three states — Connecticut, Massachusetts and Vermont — have enacted legislation incorporating the Results First approach into their policymaking process.

The State of Washington has been using the Results First approach to help steer budget decisions for nearly two decades and has developed a culture of evidence-based policymaking. One example of Washington's success is a significant reduction in juvenile crime rates due to the implementation of evidence-based juvenile justice programs. Specifically, Washington's implementation of "functional family therapy", an evidence-based program, has proven to be very cost-beneficial and effective in reducing recidivism among juvenile offenders. One member of the CJRS asked whether "functional family therapy" is used in New Mexico. Charles Sallee, deputy director of program evaluation, Legislative Finance Committee (LFC), indicated that the Children, Youth and Families Department (CYFD) used the program a number of years ago but discontinued it. He indicated that New Mexico has seen success in the area of juvenile justice, particularly because of detention-related reform in Albuquerque and the statewide use of

evidence-based juvenile justice services. These reforms resulted in the state's ability to close a number of juvenile detention centers.

Iowa used the Results First approach to identify and replace an ineffective domestic violence treatment program. Iowa found that its domestic violence treatment program was so ineffective that the state was losing \$3.00 for every \$1.00 that it invested in the program, and recidivism rates were actually increasing. After partnering with the University of Iowa to develop a new program, Iowa now realizes a long-term benefit of \$25.00 to \$35.00 for every \$1.00 invested in the new program. Mr. Saltee indicated that New Mexico currently operates a domestic violence treatment program that has been shown to be ineffective, although that program is not funded through the NMCD.

New York used its state-specific Results First model to develop the governor's public safety budget, targeting \$15 million to evidence-based programs.

Mississippi recently completed an initial analysis of its adult criminal justice programs and is currently conducting an inventory of juvenile justice programs. Mississippi passed three bills in the 2014 legislative session aimed at building a "data infrastructure". Collectively, the bills: 1) require data reporting by local courts and enforcement agencies; 2) authorize access to certain juvenile justice records for the purpose of data collection and reporting; 3) require comprehensive program inventories for four pilot agencies; and 4) define what constitutes "evidence-based", "research-based" and "promising" programs.

Ms. Holand clarified the difference between Results First and the Justice Reinvestment Initiative of The Pew Charitable Trusts. Results First informs the budgetary process and increases investment in evidence-based programs, but it is not designed to address sentencing policies or practices. The Justice Reinvestment Initiative, on the other hand, generates policy recommendations to: 1) promote systemwide reform in the criminal justice system; 2) manage growth in corrections costs; and 3) increase public safety. The two initiatives can operate separately or concurrently in any given state.

Results First received formal letters from the chair and vice chair of the LFC in 2011, requesting Results First to assist New Mexico. New Mexico is receiving the full scope of services offered by Results First. In addition, an informal partnership has been created among the LFC, the New Mexico Sentencing Commission (NMSC) and several executive agencies to implement the Results First approach. Those entities are currently in the process of developing a memorandum of understanding (MOU) to formalize the partnership. The MOU will set forth the responsibilities of each entity. The Justice Reinvestment Initiative is not involved in New Mexico.

Currently, the NMCD and the CYFD contribute data for use in the Results First model. These data have helped the LFC develop innovative reports such as *Evidence-Based Programs to Reduce Recidivism and Improve Public Safety in Adult Corrections*. Ms. Holand indicated that

the NMCD is partnering with the LFC to evaluate the programs that are offered to inmates. At present, less than one-fourth of the programs offered by the NMCD are evidence-based.

Sara Dube, manager, Results First, presented several options for further integrating the Results First approach into the policymaking process, including: 1) establishing a statutory framework aimed at implementing evidence-based programs and eliminating ineffective programs; 2) creating a statutory working group to oversee the Results First approach; and 3) requiring executive agencies to report data on programs and results.

Ms. Dube indicated that the State of Washington enacted a statute in 2012 defining what constitutes "evidence-based", "research-based" and "promising" programs. They are defined as follows:

- ▶ "evidence-based" means a program or practice that has had multiple-site random controlled trials across heterogeneous populations demonstrating that the program or practice is effective in reducing recidivism for the population;
- ▶ "research-based" means a program or practice that has some research demonstrating effectiveness but that does not yet meet the standard of evidence-based practices; and
- ▶ "promising practice" means a practice that presents, based on preliminary information, potential for becoming a research-based or consensus-based practice.

Mississippi passed legislation this year containing similar definitions. The Mississippi law further requires agencies to develop an inventory of programs and categorize each program as evidence-based, research-based, promising or as an "other program or activity with no evidence of effectiveness".

Connecticut, Massachusetts and Vermont have formed standing committees or formalized working groups with the goal of implementing evidence-based policymaking.

Mr. Sallee pointed out that the Accountability in Government Act might be a starting point in establishing a system aimed at evaluating the cost-effectiveness of government programs. He explained that agencies are given significant budget flexibility in exchange for results. In the case of the NMCD, the budget category of "inmate management and control" is a large block grant. He suggested that the CJRS might consider requiring the NMCD to provide more detail on the programs that are funded, rank the programs against an evidence-based set of criteria and report outcomes. He further indicated that the CJRS may want to consider whether it would be appropriate to restrict the NMCD's spending flexibility in certain areas. Mr. Sallee told the CJRS that the legislature recently authorized the NMCD to double caseloads for the intensive supervision program; however, evidence shows that intensive supervision is ineffective in reducing recidivism unless it is combined with treatment. He indicated that the legislature might want to reconsider the authorization to double caseloads and instead target funding for programs that have been proven effective.

Questions and Comments

One member of the CJRS asked whether the LFC plans to analyze the progress of the Missouri model since its implementation in 2005, including whether juvenile facilities, such as the J. Paul Taylor Juvenile Detention Center, conform with what the Missouri model requires. Mr. Sallee indicated that the LFC will soon be examining results of the Missouri model in New Mexico; however, that report will likely not be completed until after the interim.

Another member of the CJRS asked for clarification regarding how the LFC calculates the long-term benefits of programs. Mr. Sallee responded that the LFC uses the model that Results First created and inputs New Mexico-specific data such as population, recidivism rate, offender type and length of sentence. The model uses national research to predict the outcome in New Mexico, based on the specific New Mexico data. Ms. Holand added that the monetized value is derived by analyzing how much the recidivism curve is reduced and how much the corresponding costs, such as the costs of arrest, prosecution, incarceration and probation or parole, are thereby reduced.

Members of the CJRS engaged in a discussion about barriers to information-sharing by executive agencies.

One member of the CJRS asked for clarification on the informal partnership among the LFC, the NMSC and executive agencies. Tony Ortiz, director, NMSC, told the CJRS that the NMSC was charged with convening a stakeholder group. The group is an informal partnership, but the stakeholders are formalizing the partnership by developing an MOU that sets forth the responsibilities of each entity. The result of the effort will be a report published by the LFC on issues related to the criminal justice system.

A member of the CJRS asked whether the Results First model would help agencies collect data. Ms. Holand responded that the Results First model is an econometric tool that would not help agencies with the actual data collection. The member expressed support for a shift to evidence-based policymaking but inquired as to how this could be accomplished. Ms. Dube responded that the first step might be to develop committees or working groups or implement a statutory framework that establishes the tenets of evidence-based policymaking.

One member of the CJRS requested a description of "cognitive behavioral therapy". Ms. Dube responded that cognitive behavioral therapy programs teach behavioral skills, such as thinking about the consequences of actions and changing thought patterns. These programs are typically "talk therapy" sessions that meet regularly and have around 12 participants and a facilitator. The programs are inexpensive and have proven effective for certain types of offenders. Mr. Sallee added that 95 percent of offenders will be released back to society and the goal of cognitive behavioral therapy is to change the behavior of those individuals.

Another member of the CJRS inquired as to whether the federal government is implementing evidence-based programs. Ms. Dube responded in the affirmative and indicated that many federal agencies are requiring grant proposals to include a cost-benefit analysis.

Ms. Dube informed members of the CJRS that Results First will be holding its Annual Convening of States in Santa Fe on August 6-7, 2014. The conference will include representatives from the other states that have implemented the Results First approach and offer training sessions on common challenges faced by these states.

Approval of Minutes

Members of the CJRS voted unanimously to approve the minutes of the subcommittee's April 2014 meeting.

Breastfeeding in the Criminal Justice System

Stephanie Andrews, R.N., International Lactation Consultant Association, and Esperanza Dodge, M.S.W., Young Women United, introduced themselves. Ms. Dodge discussed the benefits of breastfeeding for infants and mothers. She explained that breastfeeding can be challenging, especially for women involved in the criminal justice system. Ms. Dodge presented a list of specific recommendations, including:

- ▶ requiring pregnancy and lactation status to be considered when determining conditions of release and bond;
- ▶ increasing the use of electronic monitoring in lieu of incarceration for women with documented pregnancy or lactation status;
- ▶ requiring detention facilities to develop a policy that is suited to their capacity and population needs and that allows inmates who are lactating to express milk for the purpose of maintaining a breast milk supply or to provide breast milk for their infants; and
- ▶ requiring the CYFD to develop a policy based on the American Academy of Pediatrics guidelines regarding breastfeeding for families involved in the CYFD's prevention, intervention, rehabilitation and aftercare services.

Micaela Cadena, policy director, Young Women United, presented works of art created by the "We Are More Than Addiction" project. She also presented a report that was prepared as a result of House Memorial 14, which was passed by the legislature in 2011. The report concerns access to substance abuse treatment and prenatal care for pregnant women with substance abuse issues.

Members of the CJRS expressed support for policy changes that would support women who wish to breast-feed or express breast milk when needed, including women who are involved with the criminal justice system.

New Mexico's Criminal Justice System: A View from the Trenches

Lee Hood, director of contract counsel legal services, Public Defender Department (PDD), told members of the CJRS that child abuse cases are complex medical cases that require an advanced level of specialization. She stated that since the legislature passed the statute concerning child abuse resulting in the death of a child — Section 30-6-1(H) NMSA 1978 — there has been a huge advancement in medical science. People who were around the child last are often automatically arrested, even though medical science cannot identify the time of trauma more precisely than within the preceding 24 hours. Ms. Hood suggested that the CJRS consider revising the law to require a showing of specific intent to kill as an element of intentional abuse of a child resulting in the death of the child. She added that the Second Judicial District Court is projecting an uptick in the number of cases screened for child abuse. Members of the CJRS requested that this issue be revisited in November.

Ms. Hood discussed the use of DNA evidence and explained that a so-called "perfect" DNA profile match means that there is a match on 13 core chromosomal loci. She indicated that a perfect match is exceedingly rare in DNA evidence. Ms. Hood explained that because of this, criminal defendants should have access to the state's DNA database for use in preparing a defense. Illinois is one of only a few states that have a statutory framework allowing a criminal defendant access to the state's DNA database if the information is material to the defense. Ms. Hood suggested that the CJRS should consider adopting the Illinois approach.

One member of the CJRS inquired as to whether criminal defense attorneys can make arguments in court concerning DNA evidence. Ms. Hood responded in the affirmative but explained that it is very expensive and clear guidelines would be preferable. Another member of the CJRS asked Ms. Hood to present these arguments to the DNA Identification System Oversight Committee.

Jennifer Romero, former assistant district attorney and former public defender, told members of the CJRS that mandatory minimum sentencing has created a system of one-size-fits-all sentencing. She further explained that criminal defendants are often unable to challenge cases against them on the merits because of the significant risk of incurring a lengthy sentence if they do not prevail. This has resulted in criminal defendants entering plea agreements, even where they may be able to prevail on the merits. Allowing judges some discretion in sentencing may improve fairness. In addition, amending the law concerning enhanced sentences for habitual offenders to allow more judicial discretion is an area that the CJRS might want to examine.

Several members of the CJRS expressed support for amending or eliminating mandatory minimum sentences and creating more judicial discretion. One member of the CJRS inquired as to whether there are any data suggesting that mandatory minimum sentencing reduces crime. Ms. Romero responded that she is unaware of whether any such data exist. The member asked whether mandatory minimum sentencing takes alternative sentencing off the table. Ms. Romero responded that when a person is subject to a mandatory minimum sentence, that person is

ineligible for alternatives such as drug court because statute requires the person to be sentenced to prison.

Another member of the CJRS asked about the relationship between mandatory minimum sentencing and sentencing for habitual offenders. Ms. Romero responded that sentencing enhancements for habitual offenders impose mandatory time because of the defendant's history, whereas mandatory minimum sentencing imposes a mandatory sentence because of the nature of the crime.

One member of the CJRS commented that the national trend is to eliminate enhanced sentencing for habitual offenders. The member indicated that pursuant to the New Mexico statutes on habitual offenders, enhanced sentences are imposed for a term of one year, four years or eight years, depending on the number of prior convictions.

Carolina Ramos, an immigration attorney, asked the CJRS to consider decriminalizing prostitution. She asked the CJRS to be mindful of the fact that human trafficking and prostitution are two different things. She indicated that criminalization of prostitution endangers sex workers, whereas decriminalization would promote safety. Ms. Ramos presented statistics that were informally compiled by the organization Safe Sex Work in Albuquerque. The statistics indicate that in Albuquerque:

- ▶ the average sex worker is 26 years old;
- ▶ 77 percent of sex workers have at least one child;
- ▶ 66 percent of sex workers are homeless;
- ▶ 75 percent of sex workers are Hispanic; and
- ▶ one-third of sex workers started in the sex work industry to pay for a drug habit.

Richard Abeyta, criminal investigator, PDD, asked the CJRS to consider changes to statutes pertaining to serious youthful offenders. Mr. Abeyta explained that a "serious youthful offender" is a child 15 to 18 years of age who is charged with first degree murder. The statute concerning serious youthful offenders allows the state to prosecute the child as an adult, without having to first establish that it is appropriate to prosecute the child as an adult. Following completion of the trial, an amenability hearing is held to determine if the child is amenable to treatment or rehabilitation. If the child is found to be amenable to treatment or rehabilitation, the child can be sentenced as a juvenile. If the court finds that the child is not amenable to treatment or rehabilitation, the court may sentence the child as an adult. Mr. Abeyta indicated that this determination should be made prior to trial. He further indicated that the prosecutor should be required to file a notice of intent to seek an adult sentence and list the factors that would justify an adult sentence.

Jorge Alvarado, chief public defender, expressed support for requiring the amenability hearing for serious youthful offenders to be held prior to trial.

Behavioral Health Care and Criminal Justice

Liane Kerr, a criminal defense attorney, told members of the CJRS that she has encountered issues in the criminal justice system concerning confidentiality of competency evaluations. She expressed concern that although competency evaluations used in criminal proceedings are required by law to be sealed, prosecutors have sought to use competency evaluations from unrelated cases for impeachment purposes. Ms. Kerr indicated that this practice violates the federal Health Insurance Portability and Accountability Act (HIPAA).

Dr. Sharon Kernan, a forensic psychologist, echoed Ms. Kerr's concerns about confidentiality of competency evaluations pursuant to HIPAA. She also stated that according to American Psychological Association guidelines, prosecutors should not have access to raw data underlying conclusions contained in competency evaluations unless the data are to be reviewed by a licensed psychologist. Finally, she expressed concern that the PDD is required to pay witnesses for the witnesses' time, but the district attorneys are not required to pay their witnesses for time.

Mia Chavez, Mental Health Division, PDD, told members of the CJRS that the statutes and the court rules concerning competency to stand trial are inconsistent. She indicated that in the Second Judicial District, prosecutors are requesting evidentiary hearings to determine competency based on a "reasonable doubt" standard (see Rule 5-602(B) NMRA). Ms. Chavez indicated that Section 31-9-2 NMSA 1978 does not mention "reasonable doubt". Ms. Chavez also indicated that communications with the court concerning competency should be held *ex parte*, with only the attorneys, but not the client, present. She indicated that in many cases, criminal defendants are upset when the issue of competency is raised, and *ex parte* communications regarding competency would be more appropriate.

Ms. Chavez told the CJRS that criminal defendants who are subject to competency proceedings experience a length of stay in detention facilities that is 278 percent longer than criminal defendants who are not involved in competency proceedings. She indicated that criminal defendants who are represented by public defenders have to wait much longer for competency evaluations, whereas criminal defendants who can afford private attorneys are able to pay for their own competency evaluations and expedite the process. Also, she indicated that although Section 31-9-1.1 NMSA 1978 requires a hearing on competency to be held no later than 30 days after completion of the evaluation, in practice it is taking much longer to complete these hearings. She stated that Section 31-9-1.1 NMSA 1978 does not prescribe any consequences for failure to hold the hearing within 30 days. She indicated that the problem could be fixed by requiring the court to dismiss the case if the hearing is not held within 30 days. Ms. Chavez told members of the CJRS that although competency and dangerousness hearings may be held contemporaneously, most judges are bifurcating these hearings, which further increases a defendant's length of stay in a detention facility.

Esperanza Lujan, Mental Health Division, PDD, gave an overview of how competency cases are handled. She stated that poor clients are often unable to post bond and that jails are

being used as a substitute for mental health care. She asked the CJRS to consider changes to statutes that would impose deadlines within which a finding of dangerousness must be made. She further indicated that the standard contained in Section 31-9-1.2 NMSA 1978 for determining whether a criminal defendant is dangerous is ambiguous. Pursuant to statute, a criminal defendant is dangerous if the defendant "presents a serious threat of inflicting great bodily harm". She indicated that the standard could be clarified by using a list of enumerated offenses, such as the list contained in Section 31-9-1.5 NMSA 1978.

Public Comment

Melissa Hill, representing the New Mexico Criminal Defense Lawyers Association, told members of the CJRS that a bill was passed in 1988 that would have returned sentencing discretion to judges; however, the bill was vetoed. She indicated that the CJRS may want to consider that legislation as part of reform efforts.

Frances Madeson stated that the secretary of corrections should withdraw the request for proposals (RFP) that was recently published seeking to add bed space beyond the current capacity of the New Mexico Women's Correctional Facility in Grants. She indicated that this RFP will lock the state into an eight-year contract. Additionally, she expressed concern about the use of solitary confinement in detention facilities and prisons in New Mexico.

K.C. Quirk, executive director of Crossroads for Women, expressed concern that when cost-benefit analysis is used to determine which programs to fund, policymakers should keep in mind that research on evidence-based programs might not be gender specific. She also indicated that women who were incarcerated often experience trauma and that rehabilitation programs should address this trauma if the programs are to be effective.

Amanda Hamilton told members of the CJRS that she is currently going through the system as a result of a conviction for possession and that she has been in and out of the system since 2009. She indicated that in 2013, she was referred to Maya's Place, which is a residential program of Crossroads for Women, and that Maya's Place offers "wraparound" services that are helping her to turn her life around.

Joseph Walsh asked the CJRS to address the lack of time limits pertaining to when competency is initially raised to when a competency evaluation must be completed. He added that time lines are particularly important for defendants who remain in custody pending trial.

Kim Chavez-Cook, PDD, indicated that she has submitted specific proposals to the co-chairs of the CJRS for statutory changes and that she will be supplementing that information in the future.

Jim Jackson, director, Disability Rights New Mexico, told members of the CJRS that the New Mexico Behavioral Health Institute (NMBHI) in Las Vegas, New Mexico, has only about 100 beds. He explained that the NMBHI serves three groups of people — serious violent

offenders who are undergoing competency evaluations, people who are being treated to competency to stand trial pursuant to court order and people who have been committed to the facility.

Vicente Vargas, state director, Office of Government Relations, New Mexico State University (NMSU), expressed support for the work of the CJRS and indicated that NMSU could provide assistance and expertise to the CJRS in areas such as criminal justice, behavioral health, juvenile justice and children's issues.

Ellen Pinnes, representing The Disability Coalition, expressed concern about the lack of services available for people suffering from mental illness. She also indicated that county jails should be helping people to sign up for Medicaid. While the Santa Fe County Detention Center has been helping people sign up for Medicaid, this is not happening in most counties.

Adjournment

There being no further business before the subcommittee, the fourth meeting of the CJRS of the CCJ adjourned at 5:20 p.m.